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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/625,628	07/24/2003	Gerrit Koppert	KOPPERT1A	9050

1444 7590 02/27/2007  
BROWDY AND NEIMARK, P.L.L.C.  
624 NINTH STREET, NW  
SUITE 300  
WASHINGTON, DC 20001-5303

EXAMINER
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ROBINSON, KEITH O NEAL

ART UNIT	PAPER NUMBER
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1638

SHORTENED STATUTORY PERIOD OF RESPONSE	MAIL DATE	DELIVERY MODE
3 MONTHS	02/27/2007	PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

## Office Action Summary

Application No.

10/625,628

Applicant(s)

KOPPERT, GERRIT

Examiner

Keith O. Robinson, Ph.D.

Art Unit

1638

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 11 December 2006.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1,2,5-12 and 16 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1,2,5-12 and 16 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 24 July 2003 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |   |   |
|---|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)  | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                        | 5) <input type="checkbox"/> Notice of Informal Patent Application                       |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)<br>Paper No(s)/Mail Date. _____ | 6) <input type="checkbox"/> Other: _____  |

## **DETAILED ACTION**

### ***Continued Examination Under 37 CFR 1.114***

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on December 12, 2006 has been entered.
2. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action mailed August 11, 2005. The amendments of claim 1 and the cancellation of claims 3, 4, 13, 14, 15 and 17, filed December 11, 2006, have been received and entered in full.
3. Claims 1, 2, 5-12 and 16 are under examination.

### ***Response to Arguments***

#### ***Claim Rejections - 35 USC § 112, first paragraph – Written Description***

4. Claims 1, 2, 5-12 and 16 remain rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. The rejection is repeated for the reasons of record as set forth in the Office Action mailed September 19, 2006.

Applicant argues that the claims meet the written description requirement because the claims have been limited to *Raphanus sativa* plants of ATCC No. PTA-3630 (line V33) (see page 5, 3<sup>rd</sup> paragraph of 'Remarks' filed December 11, 2006).

This is not persuasive. The claims filed December 11, 2006 read on any *Raphanus sativa* plant that is obtainable from the *Raphanus sativa* line ATCC No. PTA-3630. The phrase "obtainable from" appears to suggest any filial generation produced from *Raphanus sativa* line ATCC No. PTA-3630. Applicant does not specifically define "obtainable" in the specification. For example, a hybrid plant produced from a cross between *Raphanus sativa* line ATCC No. PTA-3630 and another *Raphanus sativa* plant would read on "a *Raphanus sativa* plant obtainable from *Raphanus sativa* line ATCC No. PTA-3630". The specification only provides written description for *Raphanus sativa* line V33, deposited as ATCC No. PTA-3630.

See *Vas-Cath Inc. v. Mahurkar* 1991 (CA FC) 19 USPQ2d 1111, 1115, which teaches that the purpose of the written description is for the purpose of warning an innocent purchaser, or other person using a machine, of his infringement of the patent; and at the same time, of taking from the inventor the means of practicing upon the credulity or the fears of other persons, by pretending that his invention is more than what it really is, or different from its ostensible objects, that the patentee is required to distinguish his invention in his specification.

***Claim Rejections - 35 USC § 112, first paragraph - Enablement***

5. Claims 1, 2, 5-12 and 16 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the enablement requirement. The claim(s) contains subject matter

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which was not described in the specification in such a way as to enable one skilled in the art to which it pertains, or with which it is most nearly connected, to make and/or use the invention. The rejection is repeated for the reasons of record as set forth in the Office Action mailed September 19, 2006.

Applicant argues that the claims meet the enablement requirement because the claims have been limited to *Raphanus sativa* plants of ATCC No. PTA-3630 (line V33) (see page 5, 3<sup>rd</sup> paragraph of 'Remarks' filed December 11, 2006).

This is not persuasive. The claims filed December 11, 2006 read on any *Raphanus sativa* plant that is obtainable from the *Raphanus sativa* line ATCC No. PTA-3630. The phrase "obtainable from" appears to suggest plants other than *Raphanus sativa* line ATCC No. PTA-3630. For example, a hybrid plant produced from a cross between *Raphanus sativa* line ATCC No. PTA-3630 and another *Raphanus sativa* plant would read on "a *Raphanus sativa* plant obtainable from *Raphanus sativa* line ATCC No. PTA-3630". The specification only provides guidance for *Raphanus sativa* line V33, deposited as ATCC No. PTA-3630; therefore, it would require undue trial and error experimentation for one skilled in the art to make and use the claimed invention because one skilled in the art would have to determine which, if any, *Raphanus sativa* plants could be crossed with the claimed invention, *Raphanus sativa* line V33, to produce "a *Raphanus sativa* plant obtainable from *Raphanus sativa* line ATCC No. PTA-3630".

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**Conclusion**

6. To obviate the above rejections, it is suggested that claim 1 be amended to read:

- - A *Raphanus sativa* [plant, obtainable from *Raphanus sativa*] line designated V33, wherein a representative sample of seed of said line was deposited under ATTC No. PTA-3630, characterized in that sprouts from the plant comprise anthocyanins at a level of at least 800 nmol per gram fresh weight of sprout, whereby the majority of said anthocyanins have an anthocyanidin moiety that has the structure of Formula 1, ... - - .

7. No claims are allowed.

8. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Keith O. Robinson, Ph.D. whose telephone number is 571-272-2918. The examiner can normally be reached on Monday - Friday 7:30 am - 4:00 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Anne Marie Grunberg can be reached on (571) 272-0975. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

9. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic

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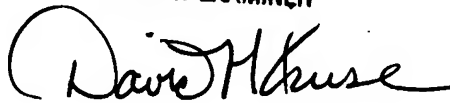
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Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Keith O. Robinson, Ph.D.

February 9, 2007

DAVID H. KRUSE, PH.D.  
PRIMARY EXAMINER

A handwritten signature in black ink, appearing to read "David H. Kruse", written in a cursive style.